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No. 90-167

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOEL EDWARD FREEDLAND,

Petitioner,

v

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE WERE NOT VIOLATED WHEN THE GRAND JURY RELEASED RECORDS TO THE ATTORNEY GENERAL WHICH THE GRAND JURY HAD OBTAINED FROM PETITIONER PURSUANT TO A SUBPOENA DUCES TECUM WHICH WERE THEN USED BY THE ATTORNEY GENERAL TO PROCEED AGAINST PETITIONER BY COMPLAINT AND WARRANT?

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STATEMENT OF FACTS

In early 1981, the Michigan Department of Attorney General's Medicaid Fraud Unit initiated an investigation of the Griggs Clinic, P.C., owned by Joel Freedland, D.O., in Detroit, Michigan. This investigation was prompted by an anonymous complaint which alleged that Petitioner, Dr. Freedland, was performing the same procedures on every patient seen in his clinic and that the billings amounted to $500.00 per patient visit, for which Petitioner billed the Medical Assistance Program (Medicaid).

The Medicaid Fraud Unit conducted interviews with patients and employees and also engaged in undercover activity. The investigation revealed that the clinic was processing vast numbers of patients each day and that the Medicaid Program was being billed for osteopathic manipulative therapy,

physical therapy, injections, x-rays, and large quantities of laboratory procedures for virtually all of the Medicaid patients who visited the clinic.

Interviews with patients revealed that much of the medical treatment rendered was unrelated to the patients' complaints and, further, that the patients were not informed of the test results. Additional investigation indicated that the physicians employed at the Griggs Clinic had received reimbursement under the Medicaid Program for medical services which were medically unnecessary and which, in many instances, were not even provided to the patients.

On October 9, 1981, the Michigan Department of Social Services suspended Dr. Freedland from participation in the Medicaid Program. For the year 1981, Petitioner

received in excess of $1,715,000 in Medicaid funds from billings submitted under his provider number and the numbers of the other doctors employed by the clinic.[1]

During the course of the investigation, the Attorney General's office determined that the matter should be presented to the then-sitting Wayne County Citizens Grand Jury for the purpose of seeking criminal indictments against Griggs Clinic, P.C., Dr. Joel E. Freedland, and his associate physicians. On February 8, 1982, a Grand Jury Subpoena Duces Tecum, issued through the Wayne County Citizens Grand Jury at the request of the

---

[1]$493,269.24 of this amount was billed under Petitioner's number for services he allegedly provided despite the fact that he has testified in an unrelated case that he did not see any patients in 1981. Dr. Joel Freedland and Audrey Freedland v Henry Ford Hospital, a Michigan non-profit corporation, Wayne County Circuit Court No. 83-317-215-NM.

Attorney General's Office, was served on Petitioner. This subpoena requested the medical files of 53 Medicaid patients, patient x-rays, Medicaid third-party billing request forms, and several Medicaid manuals utilized by the clinic explaining the billing procedures under the Medicaid Program.

Petitioner produced these subpoenaed records on February 16, 1982. The subpoenaed documents were then analyzed by medical specialists outside the Attorney General's Office to determine the degree of medical necessity of the services provided and to determine if the services were, in fact, provided at all.

The Attorney General's review of the voluminous set of records was not completed until the middle of April, 1982, at which time the case was ready for submission to the

grand jury. However, the grand jury's term was due to expire on April 28, 1982. Because the grand jury was already on its extended six-month term, no other extensions were permitted. MCL 767.7a; MSA 28.947(1). Moreover, there was no time available for this case to be presented to the grand jury during the remainder of its term because the Wayne County Prosecutor's Office had previously scheduled that time for its use. Because it was impossible to have presented all of the planned testimony and evidence to the grand jury and to have it return an indictment prior to the expiration of its term, the Attorney General's Office determined to proceed immediately against Petitioner by Complaint and Warrant.

The Assistant Attorneys General in charge of the case explained the predicament to the

members of the grand jury. In response, the grand jury authorized the Attorney General's Office to utilize the information gathered through the grand jury subpoena for use against the Petitioner by Complaint and Warrant (see Appendix H-1, H-2 attached to Petition for a Writ of Certiorari to the Michigan Court of Appeals, hereinafter "App").

On April 28, 1982, the day the grand jury's second term expired, the Attorney General's Office filed criminal complaints against Petitioner charging him with 79 counts of filing false Medicaid claims in violation of MCL 400.607; MSA 16.614(7), and one count of conspiracy to file false Medicaid claims, in violation of MCL 400.606; MSA 16.614(6).

Following an extensive preliminary exam, Petitioner was bound over for trial.

Thereafter, the People filed an information which contained 64 counts. On May 23, 1984, Petitioner filed several motions including a Motion to Quash the Information and an Alternative Motion to Suppress the Evidence obtained through the issuance of the grand jury subpoena. On June 26, 1984, Recorder's Court Chief Judge Samuel Gardner granted the motion to suppress evidence and quash the information, and issued a written opinion and order dismissing the entire criminal case. The trial court found that the prosecution, through its use of the grand jury, was able to obtain evidence against Petitioner which it could not have obtained by means of a search warrant. The court concluded that such action constituted a violation of Petitioner's constitutional right to be free from unreasonable searches and seizures (App E-6).

This decision was appealed to the Michigan Court of Appeals, which issued an unpublished per curiam opinion on April 29, 1986, reversing the opinion and order of the trial court and reinstating the criminal information. The Court reasoned:

> "A grand jury subpoena is not a 'seizure' within the meaning of the Fourth Amendment. United States v Mara, 410 US 19, 21; 93 S Ct 774, 775-776; 35 L Ed 2d 99 (1973), citing United States v Dionisio, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973). This is in large part because a subpoena lacks the abruptness, demeaning circumstances, and social stigma attached to a search and seizure. A subpoena is served in the same manner as other legal process and may be challenged before the subpoenaed documents must be produced. No officer or other person enters the subpoenaed party's premises against his will. The subpoenaing grand jury remains under the control and supervision of a court."
>
> People v Joel E. Freedland, et al, Court of Appeals No. 79865, April 29, 1986, App A-4.

The Court further found that Petitioner had no legitimate expectation of privacy in

the contents of the records released by the grand jury to the Attorney General:

> "We cannot perceive a legitimate expectation of privacy in the contents of the records released by the grand jury to the Attorney General in this case. Defendants were required to produce pursuant to the subpoena duces tecum 'records, notes, papers, writings, files or memoranda which pertain to the diagnosis and/or treatment' of 53 named patients. In our opinion, a Medicaid provider's lack of any legitimate expectation of privacy in this information is manifest in the Legislature's enactment of § 116 of the Social Welfare Act, MCL 400.111b; MSA 16.490(21b). That section requires Medicaid providers to maintain records necessary to fully document the extent of services provided .and to substantiate the medical necessity for claimed treatment, and to make available such records for examination and photocopying by the Attorney General. In light of this statutory requirement, we conclude that defendants could not harbor an actual expectation of privacy in the disputed records, nor that society would recognize such an expectation as reasonable. Accordingly, we do not believe that any governmental intrusion regarding the records constituted a search and seizure within the meaning of the Fourth Amendment."
>
> (App A-6, A-7)

The Court remanded the case to Detroit Recorder's Court for trial (App A-8).

Petitioner then filed an Application for Leave to Appeal to the Michigan Supreme Court on May 14, 1986, which was denied on September 24, 1986. The case proceeded to trial in January, 1987. Petitioner was convicted on one count of conspiracy to file false Medicaid claims and twenty-two counts of Medicaid fraud. He was fined $50,000.00 and sentenced to five to ten years imprisonment for the conspiracy conviction and concurrent terms of two to four years imprisonment for the Medicaid fraud convictions.

Following the conviction, Petitioner filed an appeal with the Michigan Court of Appeals which raised two issues: 1) a challenge to the subpoena procedure followed

by the Attorney General at issue in the instant appeal; and 2) a challenge to the jury instructions. The Court refused to review the grand jury subpoena issue, finding that review was precluded by application of the rule of the case doctrine (App B-9, B-10). The Court also ruled that the jury instructions did not cause manifest injustice (App B-8, B-9).

Petitioner filed an Application for Leave to Appeal to the Michigan Supreme Court on both issues, which was denied on April 24, 1990. Petitioner has now filed the instant appeal, petitioning for review of only the earlier Michigan Court of Appeals decision which had concluded that the procedures followed by the Attorney General in securing Petitioner's business records did not violate his Fourth Amendment rights.

REASONS FOR DENYING THE WRIT

THE MICHIGAN COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE WERE NOT VIOLATED WHEN THE GRAND JURY RELEASED RECORDS TO THE ATTORNEY GENERAL WHICH THE GRAND JURY HAD OBTAINED FROM PETITIONER PURSUANT TO A SUBPOENA DUCES TECUM WHICH WERE THEN USED BY THE ATTORNEY GENERAL TO PROCEED AGAINST PETITIONER BY COMPLAINT AND WARRANT.

A. Petitioner Did Not Have A Protected Fourth Amendment Interest In The Documents Released To The Attorney General By The Grand Jury Because He Did Not Have An Expectation Of Privacy In The Records.

Petitioner contends that he had a reasonable expectation of privacy in his medical records which was trammelled by their release by the grand jury to the Attorney General. According to Petitioner, this expectation required the issuance of a court order or a search warrant before the records could be released (Petitioner's Brief, pp 7-9). The People submit that medical records regarding

the Medicaid program which have been the subject of a grand jury subpoena are not encased in the alleged "zone of privacy," and thus the Attorney General was entitled to utilize them in a subsequent complaint and warrant.

The production of material to a grand jury in response to a subpoena does not implicate the Fourth Amendment because the subpoena is not a "seizure" in the Fourth Amendment sense. United States v Dionsio, 410 US 1, 9; 93 S Ct 764; 35 L Ed 2d 67 (1973). Moreover, not all governmental intrusions constitute searches within the meaning of the Fourth Amendment.[2] The controlling test of whether the Fourth

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[2]One seeking the benefit of the Fourth Amendment must first carry the burden of showing that the Fourth Amendment is applicable. People v Nash, 418 Mich 196, 204; 341 NW2d 439 (1983).

Amendment is implicated is whether the government's actions violated the petitioner's reasonable expectation of privacy. People v Nash, 418 Mich 196, 205; 341 NW2d 439 (1983); Katz v United States, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

The Michigan Court of Appeals held that the recordkeeping requirement imposed upon Petitioner as a Medicaid provider vitiated any legitimate expectation of privacy he had in the records in question. App A-6. One has a legitimate expectation of privacy where (s)he has an actual, subjective expectation of privacy and that actual expectation is one recognized by society as reasonable. People v Nash, supra, at 205.

The Court of Appeals also held that Petitioner did not harbor a legitimate expectation of privacy in his medical records in

light of the clear statutory requirements compelling him as a Medicaid provider to maintain and make available to the Attorney General records necessary to fully document the services provided to recipients and to substantiate the medical necessity for the treatment. App A-6. These statutory requirements are found at MCL 400.111b(6) and (7); MSA 16.490(21b)(6) and (7), which provide as follows[3]:

> "(6) A provider shall maintain records necessary to document fully the extent and cost of services, supplies, or equipment provided to a medically indigent individual and to substantiate each claim and, in accordance with professionally accepted standards, the medical necessity, appropriateness, and quality of service rendered for which a claim is made.
>
> "(7) A provider, upon request and at a reasonable time and place, shall make available any record required to be main-

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[3]These provisions were found formerly at MCL 400.111b(3) and (4); MSA 16.490(21b)(3) and (4).

> tained by subsection (6) for examination and photocopying by authorized agents of the director, the department of attorney general, or federal authorities whose duties and functions are related to state programs of medical assistance under Title XIX [Medicaid Social Security Act]. . . ."

Petitioner executed a Medicaid Provider Agreement as a condition to enrolling in the Medicaid Program. Paragraph 4 of this Agreement provided as follows:

> "I certify that the information furnished on this statement is true, accurate and complete, and I understand federal regulation (42 C.F.R. 450.21) which requires me: "a) to keep such records as are necessary fully to disclose the extent of the services provided to individuals receiving assistance under the State plan; and b) to furnish the state agency with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State agency may from time to time request."

The Medicaid Practitioner's Manual also provided notice to Petitioner of his obliga-

tion to maintain those records necessary to fully disclose and document the services provided to the recipients for a period of six years from the date of service. This requirement is also found in the Social Welfare Act, MCL 400.111b(8); MSA 16.490(21b)(8).[4] The records subpoenaed by the grand jury and released to the Attorney General encompass the information Petitioner was required to maintain.

The Attorney General is authorized to obtain all information to which the Medical Services Administration has access, 42 CFR 455.21(a)(2), and the provider must sign an agreement with the state Medicaid Agency, agreeing to disclose his/her records to both that agency and the Fraud Control Unit. 42 CFR 431.107.

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[4]This provision was numbered previously as 400.111b(5); MSA 16.490(21b)(5).

The Louisiana Supreme Court has ruled that a voluntary participant in the Medicaid program has no reasonable expectation of privacy with regard to business records involving the program. In Re: Morris Thrift Pharmacy, 397 So2d 1301 (La, 1981); In Re: Rozas Gibson Pharmacy, 382 So2d 929 (La, 1980); State v Griffon, 448 So2d 1287 (La, 1984). These rulings were based on the same rationale utilized by the Michigan Court of Appeals in the present case, i.e., that the statutory requirements cited, supra, precluded Petitioner from "harbor[ing] an actual expectation of privacy in the disputed records, [n]or that society would recognize such an expectation as reasonable." (App A-7).

Moreover, Petitioner voluntarily entered into a contract with Medicaid by which he

agreed to maintain certain records and to make them available for inspection. This has been held to be tantamount to a knowing and voluntary consent to any search and seizure of records required to be maintained and produced under the Medicaid program. United States v Griffin, 555 F2d 1323, 1324-1325 (CA 5, 1977), reh den; United States v Brown, 763 F2d 984, 987-989 (CA 8, 1985), reh and reh en banc den.

Petitioner claims that he was not bound by the statutory and regulatory provisions because he was suspended from the Medicaid program at the time the grand jury subpoenaed the records. (Petitioner's Brief, p 7). Lending support to this distinction would undermine wholly the purpose for the record-keeping and inspection requirements. At the time these records were compiled by

Petitioner, he was a Medicaid provider. Thus, the records subpoenaed by the grand jury included the time frame during which Petitioner was actively billing for services allegedly rendered to Medicaid recipients (see footnote 1, supra) and during which he had voluntarily undertaken to comply with the Medicaid recordkeeping and inspection requirements. This time frame also corresponds with the six-year period for which he was mandated to keep these records. MCL 400.111b(8); MSA 16.490(21b)(8).

The fact that Petitioner was subsequently suspended from the Medicaid program for receiving as much as $1.5 million of Medicaid monies to which he was not entitled does not embroider him with a legitimate expectation of privacy in those records. If Petitioner's contention were to prevail, the legislative

intent embodied by the state and federal Medicaid statutory requirements would be defeated. The purpose of the suspension option is to prevent the further unlawful drain of Medicaid monies from the program. If suspension of a provider obviates his/her obligation to retain these records, that provider could simply destroy all records, thereby precluding the government from recovering these unlawfully acquired funds in any criminal or civil proceeding. The requirement to maintain and to produce Medicaid and medical records to the Attorney General and the Department of Social Services is a mandatory statutory duty under state and federal law.

Petitioner's reliance on Camara v Municipal Court, 387 US 523; 87 S Ct 1727; 18 L Ed 2d 930 (1967), See v City of Seattle,

387 US 541; 87 S Ct 1737; 18 L Ed 2d 943 (1967), and Marshall v Barlow's, Inc., 436 US 307; 98 S Ct 1816; 56 L Ed 2d 305 (1978), to support his claim that he retained a subjective expectation of privacy in his medical records despite the Medicaid statutes and regulations is misplaced. (Petitioner's Brief, p 8).

At the outset, it should be noted that these cases are inapposite to Petitioner's claim because, in contrast to the situations challenged in these cases, no attempted search (warrantless or otherwise) of his home or business ever occurred. Moreover, while it is true that a search of private commercial or residential property without proper consent is unreasonable unless it has been authorized by a valid search warrant, Camara, at 528-529; See at 545, this argument is

unavailable to Petitioner because he consented to a warrantless search of Medicaid business records by virtue of his participation as a Medicaid provider. United States v Griffin, supra; United States v Brown, supra.

Additionally, unlike the circumstances underlying the searches challenged in Camara, See, and Marshall, Medicaid involves a pervasively regulated enterprise. In contrast, in Marshall, supra, the search was found unconstitutional based on this Court's conclusion that a warrantless search of commercial premises could not be justified merely because the business was involved in interstate commerce, so as to require "close supervision of employee safety and health conditions." Id., at 314. This Court ruled that the inspection would be appropriate only

B. The Procedure Utilized By The Attorney General Did Not Violate Petitioner's Rights To Be Free From Unreasonable Search And Seizure Because A Detached And Neutral Party Did Pass On The Evidence Prior To Issuing A Warrant For Petitioner's Arrest.

Petitioner contends that his Fourth Amendment rights were violated because the records were "seized ... without the intervention of a neutral and detached magistrate." (Petitioner's Brief, p 9). Petitioner further contends that the grand jury's role to determine probable cause and protect citizens against unfounded criminal prosecutions was eroded because the Attorney General was able to obtain the records in question and then make an independent decision to charge, thereby becoming the "judge of its own case." (Petitioner's Brief, p 11).

There is no requirement that an investigation once begun in the grand jury is

forever bound to that particular procedure. On the contrary, the general rule is that the prosecutor may file an information against the defendant notwithstanding a failure or a refusal of a grand jury to issue an indictment.[5] State ex rel Latour v Stone, 185 So 729 (Fla, 1939); State v Lint, 270 NW2d 598 (Iowa, 1978); Pierro v Turner, 247 P2d 291 (Okl App, 1952); State v Chavez, 599 P2d 1067 (NM 1979); Dresner v County Court in and for County of Pueblo, 540 P2d 1085 (Colo, 1975).

The fact that a prosecuting attorney is permitted to file an information even after a grand jury fails or refuses to issue a true bill of indictment (no-bill) refutes any

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[5]"Indictment" is defined in MCL 761.1; MSA 28.843 to include an information, complaint, warrant, and any other formal written accusation.

argument that the grand jury provides the only means to determine probable cause before an accused is charged. In Michigan, the determination of probable cause in the absence of a grand jury indictment is made at two stages. The first stage occurs when a complaint is filed, at which time a neutral magistrate must determine whether probable cause exists for the crime and whether the defendant is the person to be charged; the second stage is during the preliminary examination which is accorded to a criminal defendant regardless of whether (s)he was charged by indictment or complaint and warrant. People v Duncan, 388 Mich 489, 502; 201 NW2d 629 (1972).

In this case, a complaint and arrest warrant were authorized and issued by a neutral magistrate, thereby ensuring the

presence of a buffer between the accused and the State. Petitioner was afforded a preliminary examination after which the examining magistrate bound him over for trial. Thus, the inability of the grand jury to complete their investigation did not abrogate Petitioner's constitutional rights since the prosecutor could have charged by complaint and warrant even in the face of a no-bill; this process would have afforded Petitioner the identical safeguards he received here by operation of the arrest warrant and preliminary examination. In sum, Petitioner was accorded the identical due process he would have received had the case proceeded by any one of the three available options: a) indictment by grand jury; b) complaint and warrant by Attorney General after the grand jury issued a no-bill; or 3) complaint and warrant by Attorney General without any decision by the grand jury.

if the business were part of a pervasively regulated industry "long subject to close supervision and inspection, ... of which any person who chooses to enter such a business must already be aware." Id., at 313.

Similarly, the search in Camara did not involve a pervasively regulated business, but rather, a homeowner who refused to permit a municipal health inspector into his home under the authority of the San Francisco Housing Code, (Camara, at 526), while in See, the search was part of a periodic city-wide canvass designed to obtain compliance with Seattle's Fire Code. See, at 541. These cases are readily distinguished from the case at bar involving a government program which has been subject to close inspection since its inception, and which ensures that providers are apprised of its terms of par-

ticipation before they enter into the program.

As noted by Petitioner at pp 8-9 of his Brief, this Court has found a reduced expectation of privacy in closely regulated industries, allowing for warrantless searches where a substantial government interest underlies the regulatory scheme, the search is necessary to further that scheme, and the regulatory statute places the owner on notice that the search is being made pursuant to the law and has a defined scope which limits the discretion of the inspecting officers. New York v Burger, 482 US 691, 702-703; 107 S Ct 2636; 96 L Ed 2d 601 (1987).

The People submit that all of these conditions are met by the "search" at issue here. Clearly, the protection of Medicaid funds to ensure their availability for

eligible recipients represents a substantial governmental interest underlying the regulatory requirement of maintaining and making available patient records. Securing the records in order to verify the allegations of fraud was necessary to further the salutary purposes behind the Medicaid program. Petitioner was clearly on notice that these records must be maintained and that the Attorney General, among others, was entitled to inspection of those records. Finally all of the records seized were within the scope of the statute and, thus, Petitioner has no challenge to the discretion exercised by the Attorney General in securing these particular records. Id.

In sum, Petitioner had no reasonable expectation of privacy in the subpoenaed records; as a voluntary participant in the Medicaid program, he had consented to maintain and make available his recipients-patients' medical records for inspection. Griffin, supra; Brown, supra. Moreover, Petitioner, a participant in the closely regulated enterprise of Medicaid, had only a reduced expectation of privacy in his records, allowing for the warrantless and reasonable search at issue here. Marshall v Barlow's, supra; New York v Burger, supra. Thus, his Fourth Amendment rights were not violated by the procedure followed by the Attorney General in the instant case and his petition must be denied.

Petitioner claims that the procedure utilized by the Attorney General should be condemned because this mechanism allegedly allowed the Attorney General to serve as judge and jury (Petitioner's Brief, p 11). He cites Coolidge v New Hampshire, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971), reh den, and In Re: Murchison, 349 US 133; 75 S Ct 623; 99 L Ed 942 (1954), as cases in which this Court has invalidated such a procedure.

Respondent agrees that due process concerns would be implicated if the same party were to serve as both judge and jury. However, the cases relied upon by Petitioner may be distinguished easily.

Coolidge is inapplicable to the case at bar because the Attorney General did not engage in any governmental action which violated Petitioner's reasonable expectation

of privacy. The procedure condemned in Coolidge had allowed the New Hampshire Attorney General to: 1) issue the search warrant acting as a justice of the peace; 2) personally take charge of all police activities relating to the suspected criminal activity; and 3) serve as chief prosecutor at the suspect's trial. Id., at 450. In contrast, in the instant case, the Attorney General merely procured the records to which he was entitled access. Since Petitioner had consented to maintain and produce the records, he had no reasonable expectation of privacy vis a vis the State's access to those records. People v Nash, supra; In Re: Morris Thrift Pharmacy, supra; State v Griffon, supra; United States v Griffin, supra; United States v Brown, supra.

In Re: Murchison, supra, is also unavailing to Petitioner's cause. In that

case, the one-man grand juror who charged the offenses was the same person who tried and convicted the defendants. Id., pp 135, 139. In contrast, Petitioner was charged by complaint and warrant which required the issuance of a warrant by an objective magistrate who determined whether probable cause existed for the crime and whether Petitioner was the person to be charged, a district judge determined there was sufficient evidence to bind Petitioner over, and a jury of Petitioner's peers convicted him. Thus, the Attorney General was not "the judge of its own case" (Petitioner's Brief, p 12). Rather, there were three stages at which neutral parties ruled on the sufficiency of the evidence, leading to Petitioner's conviction.

Finally, Petitioner's reliance on this Court's decision in Skinner v Railway Labor

Executives Ass'n, 489 US ___; 109 S Ct 1402; 103 L Ed 2d 639 (1989), is also misplaced (Petitioner's Brief, p 10). In Skinner, this Court was confronted with a constitutional challenge to alcohol and drug testing of railway employees involved in certain train accidents or who violated certain safety rules. These tests, as "compelled intrusion[s] into the body for blood to be analyzed for alcohol content" were deemed to be Fourth Amendment searches, thereby requiring an analysis of the circumstances and nature of the search to determine its reasonableness. Id., pp 1412, 1414. In the instant case, there is no Fourth Amendment search because Petitioner did not have a reasonable expectation of privacy in his Medicaid records. People v Nash, supra; United States v Griffin, supra; United States v Brown, supra.

Thus, the procedure followed by the Attorney General in securing the records from the grand jury did not violate Petitioner's Fourth Amendment rights because several neutral and detached parties passed on the evidence leading to his convictions, and his petition should be denied.

C. Application Of The Exclusionary Rule To Prevent Use Of Petitioner's Medical Records In The Criminal Prosecution Should Not Be Invoked In Light Of The Applicability Of The Independent Source Doctrine And The Inevitable Discovery Rule.

Any claim of a violation of Petitioner's Fourth Amendment rights by the Attorney General's use of the documents obtained pursuant to the grand jury subpoena should be rejected based on both the independent source doctrine and the inevitable discovery rule, Nix v Williams, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984). The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. Id., at 443. The inevitable discovery rule provides that evidence impermissibly obtained may still be admitted at trial if the prosecution can establish by a preponderance of

system to secure criminal evidence.") Despite the fact that Petitioner conceded in the Michigan Court of Appeals that "this appeal has little to do with prosecutorial misconduct," he now resurrects a claim of prosecutorial misconduct in this petition. However, the Court of Appeals barely touched on this issue, except to say that it viewed the Attorney General's procedure "with disfavor" while refusing to "find support for the trial court's wholesale condemnation of that procedure on the record before us." (App A-7). Moreover, Petitioner appeared to abandon the issue below, and there are no facts or evidence to substantiate the allegations other than Petitioner's bald accusations.

A presumption of good faith applies to the official actions of public officials,

which in this case was the issuance of the grand jury subpoena by the Attorney General. In Beverly v United States, 468 F2d 732, 743 (CA 5, 1972), the Court stated:

> "We think also that the well recognized presumption as to the regularity of the acts of public officials--here the grand jury and its advisors--bears heavily against the appellants on this issue. See, among other cases, Consolidated Edison Co. v N.L.R.B., 1938, 305 US 197, 226, 59 S Ct 206, 215, 83 L Ed 126, 134, and United States v Chemical Foundation, 1926, 272 US 1, 47 S Ct 1, 71 L Ed 131. In the latter case it was stated:
>
> "'The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" (Emphasis added)

See also, United States v Woods, 544 F2d 242, 250 (CA 6, 1976), reh and reh en banc den (1977). In both Beverly and Woods, defendants claimed that the government used the grand jury for the purpose of preparing

the evidence that the information would have been discovered inevitably by lawful means. Id., at 444. People v Crampton, 180 Mich App 288, 293; 446 NW2d 626 (1989).

Here, the medical records in question would have been discovered without a search warrant through the procedures and requirements of MCL 400.111b(6) and (7); MSA 16.490(21b)(6) and (7), as well as the applicable federal and state Medicaid rules and regulations.[6] Thus, even if the

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[6]The trial court had predicated its decision to suppress the documents on its erroneous conclusion that the evidence could have only been "obtained by means of a search warrant which would have required a showing of probable cause before a magistrate who was duly authorized, ..., to issue a search warrant." App E-6. Because Petitioner was required to maintain and produce these records by virtue of his participation in the Medicaid program, the trial court was wrong in its determination that the Fourth Amendment was implicated so as to require a search warrant supported by probable cause. MCL 400.111b(6) and (7); MSA 16.490(21b)(6) and (7); Griffin, supra; Brown, supra.

materials produced through the use of the grand jury subpoena were held subject to the exclusionary rule, the fact that they could ultimately be produced through operation of the independent source of the aforementioned Medicaid statutes, rules, and regulations renders them admissible. By the same token, these rules would have made the documents available to the Attorney General without a search warrant, thereby satisfying the inevitable discovery rule and rendering them admissible. As the Supreme Court in Nix v Williams, supra, noted, illegally obtained evidence as well as other incriminating evidence derived from the primary evidence "does not automatically become 'sacred and inaccessible.'" Id., at 441, quoting from Silverthorn Lumber Co v United States, 251 US 385, 392; 40 S Ct 182; 64 L Ed 319 (1920). Moreover, under the inevitable discovery

exception, the prosecution need not prove the absence of bad faith in obtaining the evidence. Nix, at 445.

Because Petitioner would have been required to produce the documents regardless of the operation of the grand jury subpoena, this Court should not invoke the exclusionary rule to preclude the use of the records and this petition should be denied.

D. Petitioner's Suggestions Of Prosecutorial Misconduct Are Untrue And Not Supported By The Record.

Petitioner repeatedly suggests that the Attorney General engaged in prosecutorial misconduct in obtaining the records in question (e.g., see p 3 in which Petitioner states that the Recorder's Court accepted his contention that "the prosecution subpoenaed the documents ... without any legitimate grand jury purpose in mind," p 7 where he asserts that "the trial court determined that the Assistant Attorney General had no intention of presenting the seized records to the grand jury" and that the process followed by the Assistant Attorney General represented an "end run" around the Warrant Clause of the Fourth Amendment, and p 11, where he described the Assistant Attorney General's actions as "manipulat[ion of] the grand jury

an already pending indictment for trial. If true, this activity would be improper, since criminal discovery has its own rules and the grand jury cannot be used as a substitute. Beverly, at 743; Woods, at 249. However, defendants' "unproved suspicions" were insufficient to overcome the presumption of regularity which attaches to a grand jury's proceedings. Moreover, the burden of demonstrating an irregularity falls on the party challenging the proceeedings. Woods, at 250. Beverly, at 743.

Petitioner's allegations of misconduct are an exercise of mere speculation which fail to overcome the presumption of regularity attached to the Attorney General's use of the grand jury subpoena. Thus, his challenge must fail and his petition should be denied.

CONCLUSION

In sum, the People respectfully submit that Petitioner's writ should be denied because he has failed to articulate a constitutional violation which should be reviewed by this Court. Petitioner had no expectation of privacy in the subpoenaed medical records since he was required to maintain them as a condition of participation in the Medicaid program and they were ultimately discoverable by the Attorney General without a search warrant. Without a right of privacy, there can be no unreasonable search or seizure. In the absence of an unreasonable search or seizure, Petitioner's Fourth Amendment rights were not violated in the procedures utilized by the Attorney General in securing the records from the grand jury.

PRAYER FOR RELIEF

WHEREFORE, Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari to the Michigan Court of Appeals be denied.

Respectfully submitted,

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Dated: August 17, 1990